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*MasterCard  
International*



May 22, 2006

**Via Electronic Mail**

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Docket No 02-278

Dear Ms. Dortch:

This letter is submitted on behalf of MasterCard International Incorporated ("MasterCard")<sup>1</sup> in response to the petition filed by ACA International, and the comments submitted in response thereto, pertaining to autodialers and the collection of debts. MasterCard appreciates the opportunity to provide its comments to the Federal Communications Commission ("Commission") on this topic.

**In General**

The Telephone Consumer Protection Act ("TCPA") generally prohibits automated calls of random or sequential telephone numbers to hospitals, emergency telephone lines, and phone services for which the consumer would be charged. MasterCard agrees with this sound public policy goal, and we urge the Commission to continue to provide these important protections as part of its implementation of the TCPA. MasterCard is concerned, however, that application of the Commission's interpretation of the TCPA has the consequence of making it unnecessarily difficult and/or costly for companies to contact their existing customers in connection with their account (or other existing relationship) if those customers have provided a wireless number as the telephone number through which they want to be called. We do not believe this outcome is necessary to provide the protections envisioned under the TCPA. We therefore urge the Commission to reconsider its interpretation of the TCPA in this regard.

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<sup>1</sup> MasterCard is an SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

## Definition of “Automatic Telephone Dialing System”

The TCPA imposes a broad prohibition against any person to make a call (other than for emergency purposes or made with “the prior express consent” of the called party) using an “automatic telephone dialing system” to “any telephone number assigned to a... cellular telephone service... or any service for which the called party is charged for the call” among other types of phone lines. An “automatic telephone dialing system” is defined as “equipment which has the capacity” to: (i) “store or produce telephone numbers to be called, using a random or sequential number generator,” and (ii) “to dial such numbers.” The statute does not define “prior express consent”.

As part of the Report and Order issued by the Commission in 2003 revising its TCPA regulations, the Commission concluded that equipment that has the “capacity” to dial numbers randomly or sequentially is an automatic telephone dialing system, and therefore could not be used to call cellular telephones. The Commission concluded that predictive dialers had such “capacity”—regardless of the fact that they are generally not used, in practice, to dial random or sequential numbers, and therefore predictive dialers were deemed to be automatic telephone dialing systems. Furthermore, the Commission appears to have concluded that in no way may calls be made to cellular (or other prohibited) lines if the dialing is done in an automated fashion, absent emergency circumstances or pursuant to prior express consent. In essence, the state of the Commission’s interpretation is that if a company wants to call a consumer on a wireless number, the company must dial the number by hand.

MasterCard agrees with the Commission’s intent to protect consumers from having to pay for calls received as a result of “spam dialing”—randomly calling numbers to see if anyone will answer. We do not believe, however, that Congress intended to require telephones to be dialed by hand forever. Rather, we believe the congressional intent was to prevent consumers from being harmed by receiving unwanted calls dialed in an automated *and* random fashion. We believe that such a prohibition protects consumers appropriately because it leads to one of two results. If the caller wants to call numbers efficiently using automated equipment, he or she must have a process in place to screen certain types of numbers, *i.e.*, the person must have some knowledge of the persons he or she is calling. Alternatively, the person can “spam dial” by hand, which is extremely inefficient and therefore, for all practical purposes, acts as a *de facto* prohibition of the practice.<sup>2</sup>

In its Report and Order from 2003, the Commission indicated that the statutory reference to any equipment that has the “capacity” to engage in random dialing essentially forced the Commission to come to its conclusion. We respectfully suggest that the Commission has the ability to develop an alternative interpretation that is consistent with the statutory language and intent. As a general matter, virtually any telephone has the “capacity” to engage in random dialing—all that is necessary is some hardware and/or

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<sup>2</sup> We believe the approach taken in the TCPA is the most reasonable approach to provide the protections we have described. A simpler prohibition—one that prohibits any call to protected lines except for emergency purposes or by the express consent—would have been unworkable. Therefore, Congress had to permit some mechanism by which an average person could dial a hospital room, even without express prior consent, to wish a friend well.

software to turn the phone into an “automatic telephone dialing system.” Certainly nobody believes that a telephone, standing by itself, is what Congress had in mind as an automatic telephone dialing system when it enacted the TCPA. Similarly, it would be difficult to conclude that a telephone is an “automatic telephone dialing system” simply because some unused hardware or software is attached to, or embodied in, the phone which could theoretically be used to randomly dial numbers. Such an interpretation would prevent the use of any telephone with any modicum of computer capability to call a wireless number. Many of today’s advanced wireless telephones would then fall into the definition of “automatic telephone dialing system”. We could provide other examples, but the point is that “capacity” has to have some meaningful limitation or the definition encompasses any equipment that can dial a telephone number, including a rotary dial telephone, because there will always be the ability to automate that equipment to dial random numbers. Therefore, we believe the Commission should limit its interpretation of an “automatic telephone dialing system” to a system which has the capacity, and such capacity is functioning, to randomly dial numbers. We believe this is a reasonable interpretation, and one that avoids arbitrary boundaries.

Not only is such an interpretation reasonable, but we firmly believe that Congress did not intend for the TCPA to prohibit the use of automated equipment in connection with all telephone calls to wireless numbers. MasterCard sees no a policy justification for requiring a payment card issuer to have a customer service representative manually dial a cardholder’s wireless telephone number as opposed to having the number dialed by a machine. Therefore, we urge the Commission to consider amending its regulations implementing the TCPA to recognize that an “automatic telephone dialing system” is limited to equipment to the extent it dials numbers randomly.

### **Alternative Approaches**

If the Commission concludes that its current interpretation of “automatic telephone dialing system” is appropriate, we urge the Commission to issue a clarification with respect to wireless numbers that are provided to a caller by a customer. It is increasingly common for customers to have a wireless telephone as their only telephone. Therefore, it is reasonable to expect that customers will list their wireless telephone number as their telephone number when completing credit card applications, for example. Often, card issuers are not aware that the only number provided is a wireless number. When they learn that the single contact number available to reach a cardholder is a wireless number, card issuers who otherwise use automated dialing systems to communicate with their customers must establish an alternative, and costlier, mechanism by which they communicate with the customers who have provided wireless numbers.

Our comment letter will focus on the practices of various payment card issuers, but the practices we describe are common in many types of consumer industries today. In essence, competitive pressures to provide consumers with the most product for the least amount of money have led companies to find efficiencies in their business, including as it relates to customer service. One such efficiency is to use automated mechanisms by which existing customers can be called for any number of reasons that relate directly to the

account relationship. Use of these mechanisms reduces the costs associated with customer service functions, which ultimately reduces costs for that company's customers.

Payment card issuers contact their existing customers for a variety of reasons. For example, a card issuer may contact a cardholder to determine whether suspicious account activity is legitimate or the result of fraud. A card issuer may also contact a cardholder whose payment patterns suggest financial troubles so that the issuer can assist the cardholder, inform him or her of the available options (including counseling), as well as to inform the cardholder of the potential long-term harm to the cardholder's credit history as a result of delinquent payments.<sup>3</sup> We are aware of a major credit card issuer that called its existing cardholders to communicate recent changes in minimum payment requirements to its cardholders so that such changes (mandated by the federal banking regulators) did not take its cardholders by surprise. We are also aware of a major credit card issuer that called its existing cardholders in areas affected by Hurricane Katrina to communicate important information to them.

When making these types of calls, the card issuers we sampled made it clear to us that the use of automated equipment to dial customers at the telephone number provided by the customer was extremely important. The equipment allowed the companies to make the calls more quickly and accurately than if they were dialed by hand, resulting in increased business efficiencies. Given the millions of telephone calls made by card issuers to existing cardholders in any given year, even modest savings on a per call basis results in significant amount of money saved on an annual basis. In a market as competitive as the credit card market, a significant portion of these savings is passed on to consumers in the form of lower credit costs.

MasterCard is concerned that the existing interpretation of the TCPA suggests that card issuers must dial existing cardholders' telephone numbers by hand if the telephone number to be dialed is a wireless telephone number. Not only must card issuers establish a different mechanism by which to call these customers, but it will also necessarily be more expensive and less efficient. We do not believe there is a policy justification for this. In fact, we believe that the cardholder provided the wireless number to the card issuer *because that is the number the cardholder wanted the card issuer to use when communicating with him or her*. Because the cardholder affirmatively provided the wireless number to the card issuer, as opposed to providing a "land line" or no phone number at all, it is certainly reasonable to conclude that the cardholder prefers to receive calls to that number. Given that the cardholder has indicated that the wireless number should be used for telephone communications from the card issuer, there is no conceivable consumer harm by the use of automatic dialing equipment in these circumstances.

In short, there are a variety of reasons a payment card issuer (or other company) may need to communicate with its cardholders. We believe the Commission should not

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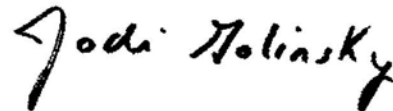
<sup>3</sup> We note that many of these goals are consistent with congressional goals as evidenced by recent statutory changes. For example, creditors are expected to provide disclosures to consumers about the consequences of making late payments as a result of the Fair and Accurate Credit Transactions Act enacted in 2003. Similarly, Congress clearly prefers that consumers understand their options when they are in financial difficulty as evidenced by the credit counseling provisions in the recent bankruptcy reform law.

prohibit a company from using an automated system to dial a wireless number if the consumer provided the number to the company in connection with an existing or potential relationship (e.g., account application), and the company is calling the number in connection with that relationship. To the extent necessary to achieve this goal, the Commission should deem these circumstances to be evidence of a consumer's prior express consent to be called using automated equipment for purposes of the statute.

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Once again, we appreciate the opportunity to comment on this issue. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

A handwritten signature in black ink that reads "Jodi Golinsky". The signature is written in a cursive, flowing style.

Jodi Golinsky  
Vice President &  
U.S. Regulatory Counsel

cc: Michael F. McEneney, Esq.